No. 48732-2-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

JEFFREY COVER, Appellant.

Appeal from the Superior Court of Clark County
The Honorable Greg Gonzales
No. 15-1-01407-2

BRIEF OF APPELLANT JEFFREY COVER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Federal Cases

Constitutional Provisions

Statutes

Rules

I. ASSIGNMENTS OF ERROR

1. The admission of Mr. Cover's statement without sufficient independent evidence of corpus delicti, was error.
2. Mr. Cover's conviction for three separate counts of rape of a child in the third degree, without sufficient evidence of three separate incidents, was error.
3. The admission of the victim's prior consistent statement, when there was no claim of recent fabrication, was error.
4. The State's arguing facts not in evidence, was error.
5. The State's misstating the burden of proof, was error.
6. The State's advising the jury that Mr. Cover was incarcerated, was error.
7. The jury instructions, that misstated the law, and allowed the jury to find an ongoing pattern of sexual abused based on lawful conduct, was error.
8. The exceptional sentenced for egregious lack of remorse, based on lawful conduct after these allegations, was error.
9. The clearly excessive exceptional sentence, was error.
10. Defense counsel's failure to object to the admissibility of Mr. Cover's statement, was error.
11. Defense counsel's failure to object to the jury instructions

and special verdict forms which misstated the law for the exceptional sentence of ongoing pattern of abuse, was error.

12. Defense counsel's failure to object to the State's argument regarding facts not in evidence, was error.
13. Defense counsel's failure to object to the State's misstatement of the burden of proof, was error.
14. Defense counsel's failure to object to the State's telling the jury that Mr. Cover was incarcerated, was error.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether a defendant's statement that he had sex with the victim, a minor, on a specific date is admissible in a case involving multiple counts of rape of a child under the corpus delicti rule when no other evidence corroborating the fact that the defendant and victim had sex on that date was admitted at trial.
2. Whether generic testimony from the victim that she had sex with the defendant ten to twenty times, is sufficient to admit the defendant's statement that he had sex with the victim on a specific date, under the corpus delicti rule.
3. Whether there is sufficient evidence to convict a defendant

of rape of a child in the third degree based solely on the defendant's uncorroborated statement that he had sex with the victim on a specific date.

4. Whether a trial court abuses its discretion by admitting a victim's prior consistent statements to her aunt and law enforcement to rebut her prior recantation, where the defense is arguing that the victim fabricated the allegations at the time when they were made and there is no claim of recent fabrication.
5. Whether a prosecutor arguing that the defendant took the victim out of State and kept her out of State to avoid prosecution, when those facts were not in evidence, to support an aggravating factor of egregious lack of remorse, constitutes flagrant and ill-intentioned misconduct.
6. Whether a prosecutor arguing that the jury must find that the State's witnesses are lying to return a not guilty verdict is a misstatement of the burden of proof that constitutes flagrant and ill-intentioned misconduct.
7. Whether a prosecutor telling the jury that the defendant is incarcerated is flagrant and ill-intentioned misconduct.
8. Whether jury instructions and special verdict forms that

allow the jury to consider on-going sexual abuse of a person under 18 as a basis for an aggravating factor misstates the law, when the victim and defendant had an on-going, lawful relationship, after the victim turned sixteen and were married.

9. Whether a trial court may rely on an on-going lawful relationship between the victim and the defendant, after the victim turned sixteen and/or married the defendant, as the basis for an exceptional sentence.
10. Whether an exceptional sentence of 180 months, the maximum sentence possible, for three counts of rape of a child, with the same victim, who later married the defendant, and where the defendant has no criminal history, is clearly excessive.
11. Whether defense counsel is ineffective when counsel fails to object to the admissibility of the defendant's statement, admitting to having sex with the victim on a particular day, under the corpus delicti when there is no independent evidence corroborating the defendant's statement.
12. Whether defense counsel is ineffective when counsel fails to object to jury instructions and special verdict forms that

misstate the law and allow the jury to consider lawful conduct between the defendant and the victim, after the victim turned 16 and married the defendant, as a basis for finding an aggravating factor of an on-going pattern of sexual abuse.

13. Whether defense counsel is ineffective for failing to object to the State arguing facts not in evidence regarding the defendant taking the victim out of State to avoid prosecution as evidence of the aggravating factor of egregious lack of remorse.

14. Whether defense counsel is ineffective for failing to object to the State misstating the burden of proof when the State argued that the jury must find that the State's witnesses were lying in order to find the defendant not guilty.

15. Whether defense counsel is ineffective for failing to object to the State's telling the jury that the defendant was incarcerated.

III. STATEMENT OF THE CASE

Ms. McConnell testified that she had sex with Mr. Cover ten to twenty times, but only testified regarding two specific incidents: 1) the first time they had sex, and 2) a threesome with Mr. Cover's girlfriend,

Ms. Barnett. (RP 185-85, 189-90, 193). During closing arguments, the State argued three specific incidents: 1) the first time they had sex, 2) the threesome with Ms. Barnett, and 3) an incident on April 14, 2007. (RP 493-94).

1. The First Time They Had Sex.

Ms. McConnell testified that when she was fifteen years old she was staying at Mr. Cover's house, on the couch. (RP 185). She testified that Mr. Cover came home drunk, laid down with her and touched her, and then pulled her into his room where they had sex. (RP 185). She testified that they he performed oral sex on her and they had had vaginal intercourse. (RP 186).

2. Threesome With Ms. Barnett.

During this time, Mr. Cover was dating Julie Ann Barnett. (RP 135). In February or March of 2007, Ms. Barnett came home and Mr. Cover and Ms. McConnell were at her house, drinking. (RP 139-40). According to Ms. Barnett, Mr. Cover and Ms. McConnell were kissing and talking about sex, they tried to talk Ms. Barnett into a threesome, saying that they were okay with it and that's what they wanted to happen. (RP 141).

Ms. McConnell testified that she had a threesome with Ms. Barnett and Mr. Cover, that there was porn on, that Ms. Barnett digitally

penetrated her and performed oral sex on her, that she had anal sex with Mr. Cover, and that it hurt. (RP 189-90).

Ms. Barnett testified that they all went into the bedroom, Mr. Cover and Ms. McConnell were kissing, she kissed and touched Ms. McConnell, and then Mr. Cover and Ms. McConnell had sex. (RP 143-44). Ms. Barnett testified that she never touched Ms. McConnell while Mr. Cover and Ms. McConnell were having sex, Ms. McConnell never cried, and they did not watch porn. (RP 158). She denied ever digitally penetrating Ms. McConnell. (RP 167).

Ms. Barnett agreed to testify against Mr. Cover in exchange for a reduction of her charge from rape of a child in the third degree to assault in the third degree and a recommendation of thirty days in jail and thirty days on work crew. (RP 153-53).

3. April 14, 2007.

Mr. Cover admitted to the police that he had had sex with Ms. McConnell. (RP 341-43). Mr. Cover told the police that the last time he had sex with Ms. McConnell was April 14, 2007, at Ms. Barnett's house. (RP 341). No other evidence regarding an incident on April 14, 2007 was admitted at trial.

4. Length of Sexual Relationship.

Ms. McConnell did not recall how long the sexual relationship with Mr. Cover lasted. (RP 203). In a defense interview, she said it lasted a few weeks to a month. (RP 203).

Mr. Cover was interrogated by the police for twenty-five minutes and denied that he and Ms. McConnell had a sexual relationship. (RP 339, 351). He did admit, at the end of the interrogation, that he had kissed Ms. McConnell, but nothing more. (RP 339, 351). The officer told Mr. Cover that he wasn't going to listen to Mr. Cover lie anymore and he was under arrest. (RP 352). The officer left for an hour and a half and came back to the holding cell where Mr. Cover was being held. (RP 353). The officer told Mr. Cover he wanted the truth, that he knew it may be hard for Mr. Cover because he had feelings for Ms. McConnell, but he wanted to know if there were feelings involved or force involved. (RP 353). At that point, Mr. Cover got emotional and said he loved her and he couldn't help it. (RP 354). Mr. Cover was asked by police if the first incident happened in the summer of 2006; he said that it did. (RP 342). He said the last time it happened was April 14, 2007. (RP 341).

5. Ms. McConnell and Mr. Cover Were Married.

Ms. McConnell testified that after Mr. Cover was charged, her grandparents and Mr. Cover's dad had a conversation and decided that she

and Mr. Cover would get married, so their relationship wouldn't be illegal. (RP 197). Mr. Cover and Ms. McConnell were present during this conversation. (RP 197).

Ms. McConnell then went to Mississippi to get married so that Mr. Cover wouldn't get in trouble. (RP 198). She flew to Mississippi with her grandparents; Mr. Cover drove with his dad. (RP 198). After that, she drove to California with Mr. Cover's dad and stayed in California until the case was dismissed. (RP 199). She did not see Mr. Cover during this time. (RP 199).

Ms. Barnett testified that Mr. Cover told her Ms. McConnell's grandmother moved her out of State to try to get everything dismissed. (RP 150). Ms. Barnett testified that Mr. Cover was not involved in moving Ms. McConnell, to her knowledge. (RP 150).

Mr. Cover and Ms. McConnell were married again in Idaho on her sixteenth birthday. (RP 200). Ms. McConnell couldn't remember why they got married a second time. (RP 200).

6. Recantation.

There was a recantation letter that Ms. McConnell did not recall writing, but testified was written in her handwriting. (RP 224-28). In the letter, Ms. McConnell stated that she had feelings for Mr. Cover, she lied about having sex with him because she felt pressured by her aunt, Megan

Cover, she did not have sex with Mr. Cover until after they were married, and she left the State because she did want to testify in court. (RP 224-28). Also, when Ms. Cover spoke to a nurse shortly after these allegations, she told the nurse that she had lied to the police about a sex toy she said Mr. Cover had used. (RP 418). She also told the nurse that she knew her relationship with Mr. Cover was wrong due to their age, but she loved him and wanted to be with him. (RP 419-20).

7. Closing Argument.

During closing arguments, the State relied on three separate incidents to support the three counts of rape of a child in the third degree: 1) the first time Mr. Cover and Ms. McConnell had sex, 2) the threesome with Ms. Barnett, and 3) an incident on April 14, 2007. (RP 285, 489, 493-94).

The State argued that Ms. McConnell suffered because she was taken out of school in the eighth grade and never finished school that she was taken away from her friends and family that Mr. Cover married her that Mr. Cover hid her at his dad's house, and then after the case was dismissed, she lived with Mr. Cover. (RP 497-98).

With regard to reasonable doubt, the State argued that in order to find Mr. Cover not guilty, the jurors would have to find that the witnesses were lying:

> Now for the defense's theory to be true – that this didn't happen – we would have to have two false confessions – the Defendant and the Ms. Barnett. We'll get into specifics.
>
> We would have to have two people that are saying – that are talking about these sex acts that are making these accusations – two separate times – nine years apart. We would have to have Stacy not only lying to you today but also lying back in 2007.
>
> And Julie Barnett would have to be lying today and also in 2007. We would have to have Megan being the mastermind behind this whole thing.

(RP 522).

8. Exceptional Sentence.

The jury found that each count was part of an ongoing pattern of sexual abuse and that Mr. Cover showed an egregious lack of remorse. (CP 163-68). The trial court found that substantial and compelling reasons to sentence Mr. Cover outside the standard range:

> As I indicated both substantial and compelling reasons are the fact that you engaged in this sex with a fourteen year old – that you continued to engage in sex with this fourteen year old – that you married her – you took her to Mississippi – you took her to Idaho. You then had her move to California with her. At some point in time - you essentially abandoned her at some point in time.

(RP 564-65). Mr. Cover was sentenced to the maximum sentence on each count, 60 months, consecutive to each other, for a total of 180 months, the absolute longest sentence that Mr. Cover could have received.

I. ARGUMENT

1. Mr. Cover's Statement That He Had Sex With Ms. McConnell on April 14, 2007 Should Have Been Suppressed Because There Was Not Sufficient Independent Evidence to Establish Corpus Delicti.

a. *This Court May Consider a Challenge to the Admissibility of a Statement for Lack of Corpus Delciti for the First Time on Appeal.*

The corpus delicti rule is not constitutionally mandated; therefore, this court "*may* refuse to review any claim of error [regarding corpus delicti] which was not raised in the trial court." *State v. Cardenas-Flores*, 374 P.3d 1217 (Wash. Ct. App. 2016), citing RAP 25; *State v. C.D.W.*, 76 Wash.App. 761, 763-64, 887 P.2d 911 (1995 (emphasis added). While this court *may* refuse to review the error regarding corpus delicti, this court has discretion to consider the error for the first time on appeal. Mr. Cover is requesting this court exercise its discretion and consider this matter for the first time on appeal.

b. *There Was Insufficient Independent Evidence to Establish Corpus Delicti for the April 14, 2007 Incident; Therefore, Mr. Cover's Statement Regarding That Incident Was Not Admissible.*

A confession is not admissible unless there is independent evidence of the corpus delicti. *State v. Aten*, 130 Wash. 2d 640, 656, 927 P.2d 210, 218 (1996). Proof of the corpus delicti of any crime requires evidence that

the crime charged has been committed by someone. *State v. Hamrick*, 19 Wn. App. 417, 419, 576 P.2d 912 (1978).

"[T]he defendant's confession or admission cannot be used to establish the corpus delicti [or] prove the defendant's guilt at trial," unless there is independent evidence that a crime was committed. *Aten*, 130 Wash. 2d at 656.

> The confession of a person charged with the commission of a crime is not sufficient to establish the corpus delicti, but if there is independent proof thereof, such confession may then be considered in connection therewith and the corpus delicti established by a combination of the independent proof and the confession.

Aten, 130 Wash. 2d at 656, quoting *State v. Meyer*, 37 Wash.2d 759, 226 P.2d 204 (1951). Independent evidence cannot be established by other statements or confessions of the defendant. *Aten*, 130 Wash. 2d at 656-57.

"[T]he corpus delicti rule requires the State to present evidence that is independent of the defendant's statement and that corroborates not just *a crime* but *the specific crime* with which the defendant has been charged." *State v. Brockob*, 159 Wash. 2d 311, 329, 150 P.3d 59, 68 (2006), *as amended* (Jan. 26, 2007) (emphasis in original). "[T]he corpus delicti rule revolves around whether independent evidence corroborates *the crime described in a defendant's incriminating statement*." *Id.*, at 331 (emphasis in original).

In *Brockob*, the defendant possessed pseudoephedrine and told the police that he intended to manufacture methamphetamine. *Id.* However, there was no independent evidence to corroborate his statement that he intended to manufacture methamphetamine. *Id.* The independent evidence only suggested that the defendant intended to steal pseudoephedrine. *Id.* Therefore, his statement was inadmissible. *Id.* at 333.

Therefore, in this case, to corroborate Mr. Cover's statement that he had sex with Ms. McConnell on April 14, 2007, the State was required to present independent evidence that Mr. Cover and Ms. McConnell had sex on that date. Because the State did not present any evidence to corroborate Mr. Cover's statement, as to that particular crime, on that particular date, his statement should not have been admitted.

There are several cases that have discussed what independent evidence is required for admission of a confession in a sex case.

In *State v. Marselle*, the defendant confessed to unlawful carnal knowledge of a child under the age of eighteen, and his confession was admitted at trial. *State v. Marselle*, 43 Wash. 273, 86 P. 586 (1906). However, the alleged victim in the case testified that there had been no sexual contact and she had lied to the police. *Id.* The Supreme Court reversed, finding that the defendant's statement should not have been

admitted and there was insufficient evidence to convict him because his confession had not been corroborated by independent evidence. *Id.* at 276.

In *State v. Mathis*, this court found that the defendant's confession to police that he digitally penetrated the victim was corroborated, in part, by his own testimony at trial. *State v. Mathis*, 73 Wash.App. 341, 869 P.2d 106, *review denied*, 124 Wash.2d 1018, 881 P.2d 254 (1994). Because the defendant testified before moving to exclude his statement, the court considered his testimony, along with victim's statement that the defendant kissed her and put his hands down her pants, to establish corpus delicti. *Id.*

In *Biles*, the defendant admitted to having sex with his daughter when she was three or four-years-old. *State v. Biles*, 73 Wash.App. 281, 871 P.2d 159, review denied, 124 Wash.2d 1011, 879 P.2d 293 (1994). His daughter testified that her father's privates were hard, touched her private parts, and his private parts were wet after; she testified that he had not entered her private parts, but that it hurt. *Id.* at 282-83, 285. The court found that the defendant's statement was admissible. This court concluded that the daughter's evidence was sufficient to corroborate the admission. *Id.* at 285.

In *C.D.W.*, the victim testified regarding several incidents of sexual contact, but none of them constituted rape. *State v. C.D.W.*, 76 Wash.App. 761, 887 P.2d 911 (1995). The defendant admitted to sexual intercourse with the victim. *Id.* at 762. The conviction was reversed for ineffective

assistance of counsel because counsel failed to object to the statement, when there was no evidence corroborating the defendant's admission. *Id.*

In this case, Mr. Cover told police that the last time he had sex with Ms. McConnell was on April 14, 2007, at Ms. Barnett's house. No other details were given. Ms. McConnell never testified about an incident on April 14, 2007. She described in detail two incidents: 1) the first time they had sex, and 2) the threesome with Ms. Barnett. She also testified that it happened ten to twenty times, but very few details were given about when or where those other incidents happened. Therefore, there was not sufficient independent evidence to corroborate Mr. Cover's statement that he had sex with Ms. McConnell on April 14, 2007. There must be independent evidence to corroborate the specific crime that the defendant confessed to; therefore, the evidence relating to separate incidents and separate crimes is irrelevant. Because there is no independent evidence to corroborate Mr. Cover's statement, the statement was not admissible.

2. There Was Insufficient Evidence to Convict Mr. Cover of Three Separate Counts of Rape of a Child in the Third Degree.

a. *There Was Insufficient Evidence to Support a Conviction for Rape of a Child in the Third Degree Based on an Incident on April 14, 2007, Absent Mr. Cover's Statement.*

"In a claim of insufficient evidence, a reviewing court examines whether ''any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt,'' viewing the evidence in the light most favorable to the State." *Brockob*, 159 Wash. 2d at 336.

Mr. Cover was charged with three, separate and distinct, counts of rape of a child in the third degree. While the State did not specify the dates or incidents in the charging document, the State presented evidence and argued three separate incidents: 1) the first time they had sex, 2) the threesome with Ms. Barnett, and 3) an incident on April 14, 2007. The jury was instructed that to convict Mr. Cover, they must find three separate and distinct incidents where Mr. Cover and Ms. McConnell engaged in sexual intercourse. (CP 143-48).

As discussed above, Mr. Cover's statement that he had sex with Ms. McConnell on April 14, 2007 was inadmissible because there was insufficient independent evidence to establish a crime was committed. "A confession not corroborated by independent evidence of the corpus delicti is not sufficient to support a conviction of crime." *Marselle*, 43 Wash. 273 at

276. Therefore, this court must consider whether or not there was sufficient evidence to support three separate convictions for rape of a child in the third degree, absent Mr. Cover's statement. *See Brockob*, 159 Wash. 2d at 338-39; *State v. Dow*, 168 Wash. 2d 243, 255, 227 P.3d 1278, 1283 (2010). In *Brockob*, the court found that without the incriminating statement, there was insufficient evidence to convict and the conviction was reversed. *Id.* at 338-39. Therefore, if there is not sufficient evidence, absent the statement, the conviction must be reversed. *See id.*

In this case, there was no evidence presented regarding an incident that occurred on April 14, 2007, other than Mr. Cover's statement. Because his statement was inadmissible, it cannot be used as evidence to support a conviction. Therefore, there is insufficient evidence to support a conviction based on an incident that occurred on April 14, 2007.

b. *There is Insufficient Evidence to Support a Conviction for a Third Count of Rape of a Child in the Third Degree Based on Evidence Unrelated to the April 14, 2007 Incident.*

"In Washington, 'a defendant can only be convicted when a unanimous jury concludes that the criminal act charged in the information has been committed.'" *State v. Newman*, 63 Wash. App. 841, 849–50, 822 P.2d 308, 312–13 (1992), citing *State v. Noltie*, 116 Wash.2d 831, 843, 809 P.2d 190 (1991). When there are multiple acts that could constitute a crime

charged, the jury must unanimously agree on the act that constitutes the charge. *Newman*, 63 Wash. App. at 849–50. The State may either elect the act that it will rely on, or the jury must be instructed that all jurors must agree on the same underlying act as the basis for their conviction. *Id.*; *see also State v. Petrich*, 101 Wash.2d 566, 572, 683 P.2d 173 (1984), holding modified on other grounds, *State v. Kitchen*, 110 Wash.2d 403, 756 P.2d 105 (1988). However, if the State does not elect a particular act associated with each count, the evidence must "'*clearly delineate specific and distinct incidents of sexual abuse*' during the charging periods." *State v. Hayes*, 81 Wash. App. 425, 431, 914 P.2d 788, 793 (1996) (internal citation omitted) (emphasis added).

In this case, there was evidence of three separate and distinct incidents: 1) the first time they had sex, 2) the threesome with Ms. Barnett, and 3) an incident on April 14, 2007. In closing argument, the State relied on these three incidents. There was no other evidence of any specific and distinct incidents of sexual intercourse between Mr. Cover and Ms. McConnell. Therefore, without Mr. Cover's statement, there is no way a jury could have convicted him of three separate counts of rape of a child in the third degree. Even if this court disagrees and finds that a jury could have convicted Mr. Cover of a third count based on Ms. McConnell's testimony that it happened ten to twenty times, there is no way for this court to know

whether or not the jury improperly relied on Mr. Cover's statement. Therefore, one count of rape of a child in the third degree must be reversed.

> In cases involving a resident child molester, the alleged victim's generic testimony can be used to support multiple counts. At a minimum, the alleged victim must be able to describe (1) the kind of act or acts with sufficient specificity for the jury to determine which offense, if any, has been committed; (2) the number of acts committed with sufficient certainty to support each count alleged by the prosecution; and (3) the general time period in which the acts occurred.

State v. Jensen, 125 Wash. App. 319, 327, 104 P.3d 717, 721 (2005), citing *Hayes*, 81 Wash.App. at 432.

In *Hayes*, the victim testified that the defendant put his private parts in hers two or three times a week, she described the sexual contact in detail, she testified about where it happened, and she described three specific incidents by reference to a date or where she was living at the time. *Hayes*, 81 Wash.App. at 434-35. The victim also testified that the defendant had sex with her at least four times, and two to three times a week, during the time period charged. *Id.* at 439-40. The court held that the details were sufficient to support four counts of rape of a child. *Id.*

In *Jensen*, the victim testified to two specific instances of molestation, as well as stating that the defendant came into her room two other times and that he touched her privates a few times, but did not specify that he touched her during the other two times he entered her room. *Jensen*,

125 Wash. App. at 327. The court of appeals reversed one count, "[b]ecause A.S.'s testimony does not describe the acts with sufficient specificity for the jury to determine which offenses, if any, Jensen committed when he entered her bedroom on the two additional occasions . . . *Id.* at 328.

In this case, Ms. McConnell testified to two specific incidents: 1) the first time she had sex with Mr. Cover, and 2) the threesome with Ms. Barnett. She also provided some generic testimony. She testified that she had sex with Mr. Cover at his house and at Ms. Barnett's house, usually in the morning, and that he would pick her up and tell her grandparents he needed her to babysit. (RP 187-88). She testified that she had vaginal sex with Mr. Cover ten to twenty times, but did not indicate how many separate dates it occurred on. (RP 193).

There was insufficient evidence to convict Mr. Cover of three separate counts of rape of a child in the third degree. At trial, there were three separate incidents relied on by the state: 1) the first time Mr. Cover and Ms. McConnell had sex, 2) the threesome with Ms. Barnett, and 3) an incident on April 14, 2007. With regard to the third incident, as argued above, there was insufficient independent evidence to establish corpus delicti.

The other evidence presented was generic evidence. This case is different than *Hayes* because there is much less detail about when and where

the sexual intercourse occurred. In *Jensen*, the victim testified that it happened a few times, but did not provide details about the sex, the time frame, location, or other details. In this case, Ms. McConnell's generic testimony did not describe the sex act that occurred in any detail, the number of acts and whether they occurred on separate dates or separate times is unclear, and there was no details provided about the time period, except to say that it occurred before she was sixteen.

Because there was not sufficient independent evidence to corroborate Mr. Cover's confession to an incident on April 14, 2007, that conviction must be reversed. In addition, there was insufficient evidence to support a third conviction. Even if this court finds that a jury may have found sufficient evidence to convict Mr. Cover absent his statement, there is no way to know whether or not the jury relied on the inadmissible evidence. Therefore, one of the convictions must be reversed.

3. The Trial Court Abused Its Discretion by Admitting Ms. McConnell's Prior Statements as Prior Consistent Statements, When There Was No Claim of Recent Fabrication.

The trial court improperly allowed the State to introduce Ms. McConnell's prior statements to her aunt and law enforcement. (RP 216). Defense counsel objected, arguing that there had been no claim of recent fabrication. (RP 215-16). A trial court's ruling on evidentiary issues is reviewed for abuse of discretion. *State v. Makela*, 66 Wash. App. 164, 168,

831 P.2d 1109, 1111 (1992). However, appellate courts review the interpretation of evidentiary rules de novo. *State v. DeVincentis,* 150 Wash.2d 11, 17, 74 P.3d 119 (2003).

A prior consistent statement is not hearsay and is admissible if "[t]he declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is ... consistent with his [or her] testimony and is offered to rebut an express or implied charge against him of *recent* fabrication or improper influence or motive[.]" ER 801(d)(1)(ii) (emphasis added).

> While the witness' prior consistent statements are not admissible to prove that the in-court allegations are true, the statements are admissible to rebut a suggestion of recent fabrication. Recent fabrication is inferred when counsel's examination "raise[s] an inference sufficient to allow counsel to argue the witness had a reason to fabricate her story later." The alleged fabrication must be recent because if the statement were made after the events giving rise to the inference of fabrication, it would have no probative value in counteracting the charge of fabrication. Further, a charge of recent fabrication can be rebutted by the use of prior consistent statements only if those statements were made under circumstances indicating that the witness was unlikely to have foreseen the legal consequences of his or her statements.

Makela, 66 Wash. App. at 168–69, quoting *State v. Bargas*, 52 Wash.App. 700, 702-03, 763 P.2d 470 (1988), review denied, 112 Wash.2d 1005 (1989) (internal citations omitted).

In this case, there was no allegation of recent fabrication. Rather, defense counsel impeached Ms. McConnell with a letter in which she recanted, to suggest that she had fabricated the allegations from the beginning. The fact that she originally disclosed the allegations to her aunt, and then law enforcement is irrelevant to whether or not the allegations were fabricated at that time. Furthermore, she was likely to foresee the legal consequences of her statements, especially those to law enforcement. The trial court erred by allowing the prior consistent statement without finding that there had been allegations of recent fabrication.

4. Prosecutorial Misconduct.

A claim of prosecutorial misconduct can be raised and considered for the first time on appeal if the prosecutor's actions "were 'so flagrant and ill-intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct.'" *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988) (internal citations omitted).

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the conduct was improper and that it prejudiced his defense. *State v. Harvey*, 34 Wn. App. 737, 740, 664 P.2d 1281 (1983), *review denied,* 100 Wn.2d 1008 (1983).

"Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial." *In re Glasmann*, 175 Wash. 2d 696,

703-04, 286 P.3d 673, 677 (2012); *State v. Davenport,* 100 Wash.2d 757, 762, 675 P.2d 1213 (1984); *see also* WASH. CONST. art I, § 21, U.S. CONST. amend. VI, XIV.

A defendant's constitutional right to a fair trial is violated when there is a substantial likelihood that improper comments affected the jury's verdict. *State v. Jungers*, 125 Wn.App. 895, 106 P.3d 827 (2005).

> Generally, improper prosecution argument, even when indirectly touching upon a constitutional right, is tested by whether the prosecution argument is so flagrant and ill-intentioned as to create incurable prejudice . . . . However, if the alleged misconduct is found to directly violate a constitutional right . . . then "it is subject to the stricter standard of constitutional harmless error."

State v. French, 101 Wn. App. 380, 385-386, 4 P.3d 857 (2000) (internal citations omitted).

a. *The State Argued Facts Not in Evidence.*

It is improper for the State to argue facts that are not in evidence. *State v. Jones*, 144 Wash. App. 284, 294, 183 P.3d 307, 313 (2008). In this case, the State argued, in support of the ongoing abuse and egregious lack of remorse, that Mr. Cover hid Ms. McConnell away, forced her to live in California, and that he took her out of school and prevented her from graduating. However, the evidence at trial was that her family arranged to take her out of State, took her out of school, and kept her out of State. While Mr. Cover was present during a conversation about this, it

was not his idea, he did not take her out of State, and he was not with her in California. Therefore, the State misstated the evidence and argued facts not in evidence. Although Mr. Cover did not object, the State's conduct was flagrant and ill-intentioned and likely affected the jury's special verdict findings.

b. *The State Misstated the Burden of Proof.*

It is improper for a prosecutor to misstate the burden of proof. *See State v. Johnson*, 158 Wn.App. 677, 685; 243 P.3d 936 (2010). In *Johnson*, the State misstated the burden of proof in its closing argument, arguing that in order to find the defendant not guilty, the jurors had to have a reason to doubt and implied that the jurors must convict unless they had a reason not to. *Id.* Defense counsel neither objected nor requested a curative instruction. *Id.* at 683. However, the court held that this argument was "flagrant, ill-intentioned and incurable by a trial court's instruction in response to a defense objection." *Id.* at 685. "[A] misstatement about the law and the presumption of innocence due a defendant, the 'bedrock upon which [our] criminal justice system stands,' constitutes great prejudice because it reduces the State's burden and undermines a defendant's due process rights." *Id.* at 685-86, citing *State v. Bennett*, 161 Wn.2d 303, 315, 165 P.3d 12421 (2007); *State v. Anderson*, 153 Wn. App. 417, 432, 220 P.3d 1273 (2009)). Therefore, the

court held that the argument constituted prosecutorial misconduct and reversed the conviction. *Id.* at 686.

Our courts have "repeatedly held that it is misconduct for a prosecutor to argue that in order to acquit a defendant, the jury must find that the State's witnesses are either lying or mistaken." *State v. Fleming*, 83 Wash. App. 209, 213, 921 P.2d 1076, 1078 (1996), citing *State v. Casteneda–Perez*, 61 Wash.App. 354, 362–63, 810 P.2d 74 ("it is misleading and unfair to make it appear that an acquittal requires the conclusion that the police officers are lying"), review denied, 118 Wash.2d 1007, 822 P.2d 287 (1991); *State v. Wright*, 76 Wash.App. 811, 826, 888 P.2d 1214, review denied 127 Wash.2d 1010, 902 P.2d 163 (1995); *State v. Barrow*, 60 Wash.App. 869, 874–75, 809 P.2d 209, review denied 118 Wash.2d 1007, 822 P.2d 288 (1991). Such arguments misstate the burden of proof and the role of the jury. *Id.* Instead, the jury is "required to acquit unless it had an abiding conviction in the truth of [the witness'] testimony." *Id.*

In this case, the State improperly argued that in order to find Mr. Cover not guilty, the jury had to find that the State's witnesses were lying. Although this improper argument was not objected to, this court should consider it for the first time on appeal because the misstatement of the burden of proof was flagrant and ill-intentioned and contrary to

established case law. Furthermore, this court should reversed Mr. Cover's convictions because a misstatement of the burden of proof constitutes great prejudice. *Johnson*, 158 Wn. App. at 685-86.

c. *The State Improperly Told the Jury that Mr. Cover Was Incarcerated.*

It is reversible error for a defendant to appear in front of a jury in shackles because it denies the defendant a fair and impartial trial under the Sixth and Fourteenth Amendments to the United States Constitution. *State v. Clark*, 143 Wash. 2d 731, 773, 24 P.3d 1006, 1027 (2001); *State v. Finch*, 137 Wash.2d 792, 842, 975 P.2d 967, cert. denied, 528 U.S. 922, 120 S.Ct. 285, 145 L.Ed.2d 239 (1999); U.S. CONST. amend. VI, XIV. Also, the admission of booking photos can also be improper because it can prejudice a defendant. *State v. Sanford*, 128 Wash. App. 280, 286, 115 P.3d 368, 371 (2005); *State v. Henderson*, 100 Wash. App. 794, 803, 998 P.2d 907 (2000). For the same reasons, it is prejudicial for the jury to know that a defendant is incarcerated during trial.

In this case, the prosecutor attempted to impeach Ms. Patton by questioning her about how hard it was not having Mr. Cover living with her anymore and that she wanted him home. (RP 448). The State went on to explicitly tell the jury that Mr. Cover was in jail, asking Ms. Patton, "Have you spoke with the Defendant on the phone since he's been in

custody at the Clark County Jail?" (RP 448). The fact that Mr. Cover was in jail was not in evidence and it was improper and prejudicial for the prosecutor to tell the jury that he was incarcerated. Although Mr. Cover did not object, the misconduct was flagrant and ill-intentioned and could not have been cured by an objection after the jury heard the State's question.

5. The Jury Instructions and Special Verdict Form Regarding Ongoing Pattern of Abuse Misstated the Law and Allowed the Jury to Find An Aggravating Factor Based on Lawful Behavior.

When a jury instruction was not objected to at trial, it can be reviewed if it involves a manifest error affecting a constitutional right. *State v. Schaler*, 169 Wn.2d 274, 284, 236 P.3d 858 (2010).

> An error is manifest if it had practical and identifiable consequences in the case. This standard is also referred to as "actual prejudice." . . .
>
> "[T]he focus of the actual prejudice [analysis] must be on whether the error is so obvious on the record that the error warrants appellate review. ... Thus, to determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error."

Id. (quoting *State v. O'Hara*, 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009)) (internal citations omitted). A manifest error may occur if the trial court

allows jury instructions clearly inconsistent with the law or that would allow a person to be convicted of lawful conduct. *See id.* at 287.

In this case, the jury was instructed on the aggravating factor of an ongoing pattern of abuse and asked in the special verdict forms: "Was the crime part of an ongoing pattern of sexual abuse of the same victim under the age of 18 years manifested by multiple incidents over a prolonged period of time?" (CP 151-53, 163-68). However, any sexual intercourse that Mr. Cover and Ms. McConnell engaged in after they were married and/or after she turned sixteen was not unlawful. RCW 9A.44.079. In *Epefanio*, the court found that modifying the jury instructions from under 18 years to under 16 years was an accurate statement of the law: "The court simply had to limit the age to 16 years because sexual contact after the age of 16 was not a crime. RCW 9A.44.079(1). The court's instructions were then a correct statement of the law." *State v. Epefanio*, 156 Wash. App. 378, 391, 234 P.3d 253, 260 (2010).

Similarly, in this case, any sexual contact between Mr. Cover and Ms. McConnell, after she turned sixteen and/or after they were married, was lawful and should not have been considered as the basis for an exceptional sentence. Because there was evidence introduced regarding Mr. Cover and Ms. McConnell getting married and living together after she was sixteen, but before she was eighteen, the jury may have

improperly considered this evidence in determining an ongoing pattern of sexual abuse. There is no way of knowing whether or not the jury would have found that the evidence of sexual contact prior to Ms. McConnell's sixteenth birthday was sufficient to establish on ongoing pattern of abuse. Therefore, the aggravating factors and exceptional sentences should be reversed.

6. Exceptional Sentence.

A defendant may appeal a sentence outside the standard range. RCW 9.94A.585(1). Imposition of consecutive sentences, when they would otherwise be concurrent, is a sentence outside the standard range, which is appealable. RCW 9.94A.535.

> To reverse a sentence which is outside the standard sentence range, the reviewing court must find: (a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient.

RCW 9.94A.585(4).

An exceptional sentence is reviewed for abuse of discretion. *State v. Ritchie*, 126 Wash. 2d 388, 393, 894 P.2d 1308, 1312 (1995).

> In order to abuse its discretion in determining the length of an exceptional sentence above the standard range, the trial court must do one of two things: rely on an impermissible reason (the "untenable grounds/untenable reasons" prong of the standard) or impose a sentence which is so long that, in light

> of the record, it shocks the conscience of the reviewing court (the "no reasonable person" prong of the standard).

Id. at 393, citing *State v. Ross*, 71 Wash.App. 556, 571-72, 861 P.2d 473 (1993).

a. *The Trial Court Improperly Relied on the Fact That Mr. Cover Married Ms. McConnell and Had a Relationship With Her as the Basis for an Exceptional Sentence.*

Bragging about getting away with a crime and engaging in criminal activity shortly after charges are dismissed can show an egregious lack of remorse. *State v. Reynolds*, 80 Wash. App. 851, 859, 912 P.2d 494, 500 (1996). In this case, the court based its exceptional sentence on the fact that Mr. Cover married Ms. McConnell and lived with her after the allegations in this case:

> As I indicated both substantial and compelling reasons are the fact that you engaged in this sex with a fourteen year old – that you continued to engage in sex with this fourteen year old – that you married her – you took her to Mississippi – you took her to Idaho. You then had her move to California with her. At some point in time - you essentially abandoned her at some point in time.

(RP 564-65). First, the record is not clear on whether Ms. McConnell was fourteen or fifteen at the time of the allegations. More importantly, the fact that Mr. Cover legally married her after the case was dismissed and lived with her, as a married couple, after she was sixteen years old, should not be the basis for a an exceptional sentence based on egregious lack of remorse or

an on-going pattern of sexual abuse. He never bragged about avoiding prosecution, and his actions after the dismissal were not unlawful. Mr. Cover told police, and others, that he loved Ms. McConnell. His marriage to her and their relationship after the fact was lawful. In addition, there was no evidence that Mr. Cover abandoned Ms. McConnell. She testified that she left him. (RP 230). The trial court's reliance on these facts as the basis for an exceptional sentence was improper.

b. *The Exceptional Sentence Was Clearly Excessive.*

Mr. Cover was convicted of three counts of rape of a child in the third degree. Rape of a child in the third degree is a class C felony, with a maximum penalty of 60 months. 9A.44.079. The standard range for Mr. Cover was 46-60 months. (CP 182, 206). Mr. Cover was sentenced to 60 months on each charge, consecutive, for a total of 180 months, or fifteen years. (CP 207). The sentence was the absolute maximum sentence allowed by law. All three counts involved the same victim, who later married Mr. Cover. Mr. Cover was 41-years-old at the time of sentencing and had no criminal history. (RP 564). Based on the facts of this case, the exceptional sentence was clearly excessive.

7. Mr. Cover Received Ineffective Assistance of Counsel.

To establish ineffective assistance of counsel, the defendant must establish that his attorney's performance was deficient and the deficiency prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Deficient performance is performance falling "below an objective standard of reasonableness based on consideration of all the circumstances." *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Reasonable conduct for an attorney includes carrying out the duty to research the relevant law. *Strickland*, 466 U.S. at 690-91. The prejudice prong requires the defendant to prove that there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different. *State v. Leavitt*, 111 Wn.2d 66, 72, 758 P.2d 982 (1988).

a. *Defense Counsel Was Ineffective For Failing to Object to the Admissibility of His Statement for Lack of Corpus Delicti.*

As argued above, there was insufficient independent evidence to establish corpus delicti for an incident on April 14, 2007; therefore, Mr. Cover's confession regarding that incident should have been suppressed.

The court of appeals held in *C.D.W.*, that defense counsel's failure to object to the admission of the respondent's confession in a juvenile rape

case, where there was no independent evidence of penetration, constituted ineffective assistance of counsel. *State v. C.D.W.*, 76 Wash. App. 761, 764, 887 P.2d 911, 914 (1995). In *C.D.W.*, the defendant admitted to having sex with the victim; however, the victim testified about several incidents of molestation, but no incidents involving sex. *Id.* at 761. On appeal, the State conceded that there was insufficient independent evidence of corpus delicti, but argued that the issue had been waived because counsel had failed to object or move to suppress the statement at trial. *Id.* C.D.W. argued ineffective assistance of counsel. *Id.* The court held that "the failure to raise the issue of the corpus delicti rule in this case cannot be characterized as a trial strategy; it appears to be simply an inexcusable omission on the part of defense counsel." *Id.* at 764. C.D.W's conviction was reversed. *Id.* at 764-65[1].

In this case, defense counsel failed to object to the admission of Mr. Cover's statement regarding sex with the victim on April 14, 2007. If defense counsel would have objected, the trial court should have suppressed the statement, and Mr. Cover would not have been convicted of one of the counts of rape of a child in the third degree. Even if this court finds that Mr.

[1] In *C.D.W*, Division I reversed and remanded for a new trial, stating that although there was insufficient evidence to convict absent the inadmissible statement, remand for a new trial, rather than dismissal was the appropriate remedy because the corpus delicti rule is evidentiary. *C.D.W.*, 76 Wash. at 764, fn 2. However, our Supreme Court has reversed and dismissed in similar cases. *See Brockob*, 159 Wash. 2d at 338-39.

Cover could have been found guilty based on the generic testimony that Mr. Cover and Ms. McConnell engaged in sexual intercourse on other occasions, there is no way for this court to know whether or not the jury relied on Mr. Cover's statement, or other evidence, in reaching its verdict. Therefore, Mr. Cover was prejudiced by the ineffective assistance of counsel and one of the counts of rape of a child in the third degree should be reversed.

b. *Defense Counsel Was Ineffective For Failing to Object to the Jury Instructions Special Verdict Forms Regarding Ongoing Pattern of Sexual Abuse.*

As argued above, the special verdict forms regarding ongoing pattern of abuse misstated the law and allowed jury to find an aggravating factor based on lawful conduct. In *Kyllo*, defense counsel proposed jury instructions which misstated the law on self-defense. *State v. Kyllo*, 166 Wash. 2d 856, 868, 215 P.3d 177, 183 (2009). On appeal, the court found that counsel was ineffective for failing to properly research the law on self-defense and reversed the conviction. *Id.* at 870-71. Furthermore, there was no tactical or strategical reason to propose improper jury instructions. *Id.* at 868.

In this case, defense counsel failed to object to the jury instructions and special verdict forms, or propose alternatives, which allowed the jury to consider as part of an ongoing pattern of abuse, consensual, lawful, sexual

contact after Ms. McConnell turned sixteen and married Mr. Cover. The failure to object denied Mr. Cover of effective assistance of counsel.

c. *Defense Counsel Was Ineffective For Failing to Object to the State Telling the Jury That Mr. Cover Was Incarcerated.*

As argued above, the State committed prosecutorial misconduct by arguing facts not in evidence, misstating the burden of proof, and telling the jury that Mr. Cover was incarcerated. Defense counsel's failure to object to the State's misconduct was unreasonable and prejudiced Mr. Cover and there was no tactical reason to fail to object. Therefore, counsel's failure to object denied Mr. Cover effective assistance of counsel.

8. The Cumulative Error Denied Mr. Cover a Fair Trial.

Even if the individual errors during trial do not require reversal, reversal is required if the cumulative effect of the errors denied the defendant a fair trial. *See, e.g., State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *State v. Badda*, 63 Wn.2d 176, 183, 385 P.2d 859 (1963); *State v. Alexander*, 64 Wn. App. 147, 158, 822 P.2d 1250 (1992); *State v. Whalon*, 1 Wn. App. 785, 804, 464 P.2d 730 (1970); *see also* WASH. CONST. art I, § 21, U.S. CONST. amend. VI, XIV.

As argued above, there were multiple errors at trial. Those errors denied Mr. Cover a fair trial for several reasons. The jury was allowed to consider Mr. Cover's statement, which should have been suppressed. The

jury was allowed to hear Ms. McConnell's prior statements to her aunt and law enforcement, which bolstered her credibility. The State's two main witnesses' credibility was at issue. Ms. McConnell and Ms. Barnett both testified that Mr. Cover engaged in sexual intercourse with Ms. Barnett. However, Ms. McConnell had recanted in a letter and Ms. Barnett testified in exchange for a significant reduction in her charges. And, their testimony was inconsistent with each other.

The jury was allowed to improperly consider evidence regarding the time that Mr. Cover and Ms. McConnell were married as evidence of an on-going pattern of abuse and the State improperly argued that Mr. Cover took Ms. McConnell out of school and out of State, when it was her family. The jury was also told that Mr. Cover was incarcerated, which is prejudicial. Furthermore, all of the errors were compounded by the State's misstatement of the burden of proof. The cumulative effect of these errors denied Mr. Cover a fair trial and likely affected the jury's verdict, at least as to one count of rape of a child in the third degree and as to the aggravating factors.

9. This Court Should Not Impose Appellate Costs Because Mr. Cover is Indigent and Unable to Pay.

This Court has discretion on whether or not to impose appellate costs in a criminal case. *State v. Sinclair*, 192 Wash. App. 380, 389-90, 367 P.3d 612, 616 (2016); *see also* RAP 14.2[2], 14.1(c)[3].

> As a general matter, the imposition of costs against indigent defendants raises problems that are well documented in Blazina—e.g., "increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration." *Blazina*, 182 Wash.2d at 835, 344 P.3d 680. It is entirely appropriate for an appellate court to be mindful of these concerns. Carrying an obligation to pay [appellate costs] plus accumulated interest can be quite a millstone around the neck of an indigent offender.

Sinclair, 192 Wash. App. at 391-92, quoting *State v. Blazina*, 182 Wn.2d 827, 301 P.3d 492 344 P.3d 680, 686 (2015). Although *Blazina* is not binding for appellate costs, some of the same policy considerations apply. *Id.*

Under *Blazina*, a trial court must consider "important factors, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay." *Blazina*, 182 Wn.2d at 838. In

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[2] "A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, *unless the appellate court directs otherwise in its decision terminating review*." RAP 14.2 (emphasis added).

[3] "If the court determines costs in its opinion or order, a commissioner or clerk will award costs in accordance with that determination." RAP 14.1(c).

addition, if a person is considered indigent, "courts should seriously question that person's ability to pay . . . ." *Id.*

A trial court's finding of indigency will be respected unless there is good cause not to do so. *Sinclair*, 192 Wash. App. at 393; *see also* RAP 15.

In this case, Mr. Cover was found indigent and counsel was appointed for his trial, as well as this appeal. (CP 255-57). In addition, the trial court waived all non-mandatory legal financial obligations (RP 561, 569, CP 204-220). Furthermore, Mr. Cover was sentenced to 180 months in prison; therefore, it is extremely unlikely that he will be able to pay appellate costs. (CP 204-220). Therefore, this Court should exercise its discretion and not award appellate costs in this matter, if Mr. Cover does not substantially prevail.

I. CONCLUSION

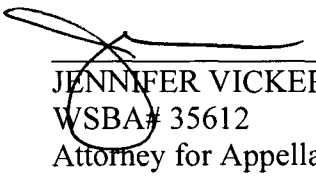
In conclusion, there was insufficient evidence to convict Mr. Cover of one of the counts of rape of a child in the third degree because there was insufficient independent evidence to corroborate his statement and his counsel was ineffective for failing to object to the admissibility of his statement. In the alternative, Mr. Cover's convictions should be reversed and remanded for a new trial because the trial court improperly admitted the victim's prior consistent statements, the State committed

prosecutorial misconduct by misstating the burden of proof and telling the jury that he was incarcerated, and because he received ineffective assistance of counsel.

In addition, Mr. Cover's exceptional sentences should be reversed because the jury instructions misstated the law, the State argued facts not in evidence regarding the exceptional sentence, and the trial court abused its discretion.

Dated this 18th day of August, 2016.

Respectfully Submitted,



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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, vs. JEFFREY COVER, Appellant.	NO. 48732-2-II CERTIFICATE OF SERVICE

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The undersigned certifies that on this day correct copies of this appellant's brief were delivered by U.S. mail to the following:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington.

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Signed August 18, 2016 at Tacoma, Washington.

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